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No. 81-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. BUSH,

Petitioner,

v.

WILLIAM R. LUCAS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF REPRESENTATIVES PATRICIA SCHROEDER, DANTE B. FASCELL, MORRIS K. UDALL, SHIRLEY CHISHOLM, BRUCE F. VENTO, DONALD JOSEPH ALBOSTA, GERALDINE FERRARO, MIKE LOWRY, THOMAS E. PETRI, AND SENATOR WILLIAM PROXMIRE, MEMBERS OF CONGRESS, AND THE NATIONAL TAXPAYERS UNION, IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

This brief is submitted on behalf of current members of the United States Congress and the National Taxpayers Union. Congressional *amici* have a strong interest in obtaining accurate and truthful information from federal employees of the Executive branch in order that Congress might exercise effectively its constitutional duty to oversee the execution of its laws by that branch. Because denial to federal employees of an implied cause of action under the First Amendment may chill the flow of information from such employees and thereby impede the important congressional function of informed and effective oversight,

amici submit the following brief in support of petitioner.[1] The National Taxpayers Union is an organization committed to protecting the taxpayers by reducing unnecessary federal government spending, a goal which is furthered by protecting federal employees who disclose such spending.

SUMMARY OF ARGUMENT

The lower court's denial of a *Bivens* remedy to federal employees is contrary to the controlling decisions of this Court. *Carlson* v. *Green*, 446 U.S. 14 (1980), recognized only two limited situations in which a *Bivens* remedy was inappropriate. Neither is present here.

The holding of the court below that the federal employment relationship is a special factor precluding a *Bivens* remedy is inconsistent with prior holdings of this Court and is an unwarranted expansion of a narrow exception to the *Bivens* doctrine. Furthermore, to the extent that federal employment might pose any special concerns, these concerns are coextensive with the qualified immunity available to federal supervisory officials, and do not justify denial of a *Bivens* remedy.

The express reliance by the court below, in denying a *Bivens* remedy, on the availability of alternative civil service remedies was in error because the court below failed to make the findings, required by *Carlson*, that Congress intended these civil service remedies to be exclusive and viewed these remedies as equally effective. Indeed, congressional intent is clearly to the contrary, and supports the implication of a *Bivens* remedy.

Denial of a *Bivens* remedy will interfere with the ability of Congress to obtain information from federal employees and thereby hinder the effective exercise of the congressional oversight function.

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[1] The parties' letters of consent are being lodged with the Clerk pursuant to Rule 36.1.

ARGUMENT

I. Petitioner's Status as a Federal Employee Does Not Preclude an Implied Cause of Action Under the First Amendment

Petitioner, a civil service aerospace engineer, was reduced in grade and transferred, after making certain statements to the media. Because the case is before this Court on respondent's motion for summary judgment, the factual allegations in petitioner's complaint must be accepted as true. *See Patsy* v. *Board of Regents of State of Fla.*, 102 S. Ct. 2557, 2559 n.1 (1982). Thus, accepting as correct petitioner's contention that respondent has penalized him for the exercise of protected First Amendment rights, the Court must decide what remedies are available to petitioner for this constitutional violation.

It is well established that victims of a constitutional violation by a federal official have an implied right under the Constitution to recover damages against that official in federal court, even in the absence of a statute conferring such a right. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Davis* v. *Passman*, 442 U.S. 228 (1979); *Carlson* v. *Green*, 446 U.S. 14 (1980). As this Court held in *Carlson* v. *Green*, *supra*, a *Bivens* remedy for damages against a federal official for unconstitutional conduct is implied under the Constitution except in two very limited circumstances: (1) "when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress'" or (2) "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Carlson* v. *Green*, *supra*, 446 U.S. at 18-19.[2]

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[2] While *Bivens*, *Davis*, and *Carlson* authorized implied causes of action under the Fourth, Fifth, and Eighth Amendments respectively, this Court in *Carlson* made it clear that a *Bivens*-type

Because the court below initially applied a different analysis in this case, this Court vacated the initial judgment and remanded "for further consideration in light of *Carlson* v. *Green*." *Bush* v. *Lucas*, 446 U.S. 914 (1980). Thereafter, the court below purported to apply the *Carlson* v. *Green* tests but reinstated its previous conclusions. Contrary to the conclusion of the court below, neither of the two limited exceptions set forth in *Carlson* is met in this case and accordingly a direct cause of action should be implied.

A. The Court Below in Denying a *Bivens* Remedy Failed to Follow the Controlling Decisions of this Court

It is well established that the First Amendment protects all public employees against firing or demotion by reason of the exercise of the constitutional right of free speech. *See, e.g., Branti* v. *Finkel*, 445 U.S. 507 (1980); *Elrod* v. *Burns*, 427 U.S. 347 (1976); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967). This Court has explicitly recognized the right of public employees to comment on "matters of public interest," even if these matters concern the operation of the agency in which they are employed or concern their superiors. *Pickering* v. *Board of Education*, 391 U.S. 562, 568, 574 (1968). The degree of First Amendment protection accorded to a public employee strikes a balance between the employee's interest in comment upon matters of public concern, and the governmental employer's interest in the efficient provision of public services. *Pickering* v. *Board of Educa-*

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remedy was available to any "victim of a constitutional violation," *id.* at 18, and not limited to violations of particular amendments. Thus, implied causes of action under the First Amendment have been upheld in many circuit courts of appeals. *E.g.*, Trapnell v. Riggsdy, 622 F.2d 290, 294 (7th Cir. 1980); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); Paton v. La Prade, 524 F.2d 862, 869-71 (3d Cir. 1975); Yiamouyiannis v. Chemical Abstracts Service, 521 F.2d 1392 (6th Cir. 1975) (*per curiam*), *cert. denied*, 439 U.S. 983 (1978).

tion, *supra*, 391 U.S. at 568. This constitutional balance is struck in favor of the employee even in situations where he "has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer." *Id.* at 572.

For purposes of its decision, the court below did not dispute that petitioner's statements were protected by the First Amendment. Rather, it held that the relationship between the federal government and its employees was a "special factor counseling hesitation" in inferring a *Bivens* remedy and therefore concluded that a federal employee had no implied cause of action for damages under the First Amendment. This holding was in error for the following reasons.

First, it is inconsistent with *Davis* v. *Passman*, *supra*, in which the government employer-employee relationship was not held to be a "special factor" precluding a *Bivens* remedy. In *Davis*, a deputy administrative assistant sued her employer Congressman Otto E. Passman for sex discrimination in the termination of her employment. Despite the existence of a governmental employer-employee relationship in *Davis*, this Court readily inferred an implied cause of action under *Bivens*. *Davis* squarely contradicts the conclusion of the court below that the government employer-employee relationship *per se* falls within the first prong of the *Bivens-Carlson* exceptions, namely a "special factor counselling hesitation" in implying a *Bivens* remedy.

Second, the court below misapplied *Carlson*. The court relied heavily on the availability of alternative civil service remedies, but purported not to reach the second prong of the *Carlson* test which requires a finding that alternative remedies are equally effective. *Bush* v. *Lucas*, *supra*, 647 F.2d 573, 577 (5th Cir. 1981). Instead the court found that the availability of the civil service remedies was a "special factor" under the first prong. This analysis collapses this Court's two carefully defined excep-

tions into one, and effectively negates the *Carlson* requirement that only those remedies which are specifically declared by Congress to be equally effective substitutes may be deemed sufficient to preclude a *Bivens* remedy. *Carlson, supra*, 446 U.S. at 18-19. *See Sonntag* v. *Dooley*, 650 F.2d 904, 907 (7th Cir. 1981). If upheld, the analysis of the court below would deny a *Bivens* remedy in any case where any alternative remedy whatsoever is available;[3] precisely this analysis was rejected in *Carlson*. There, this Court held that the mere presence of an alternative remedy under the Federal Tort Claims Act did not preclude a *Bivens* remedy, because Congress had not explicitly declared it equally effective. The court below made no finding of such congressional declarations, as required by *Carlson* (nor could the court have made such a finding, as explained in Section II below).

Third, the expansive reading by the court below of the *Bivens* exception for "special factors counselling hesitation" is wholly at odds with the narrow construction of that *Bivens* exception by this Court. The *Bivens* opinion recognized only two unique circumstances where an implied constitutional remedy was precluded by "special factors counseling hesitation": (1) cases involving "federal fiscal policy" where the United States was a plaintiff, such as *United States* v. *Standard Oil*, 332 U.S. 301 (1947) and (2) cases involving liability of a congressional employee for non-constitutional claims, such as *Wheeldin* v. *Wheeler*, 373 U.S. 647 (1963). *Bivens, supra*, 403 U.S. at 396. Neither of these "special factors" is present here. Yet a third "special factor counselling hesitation" was recognized in *Davis* v. *Passman, supra*, where this Court stated that employment discrim-

[3] This same error was committed by the Eighth Circuit in Bishop v. Tice, 622 F.2d 349 (8th Cir. 1980), relied upon by the court below, which stated—erroneously—that "a *Bivens* analysis is obviated once an adequate federal remedy is shown to exist." *Id.* at 356 n.12. The proper test is whether the remedy is equally effective —not merely "adequate"—and whether Congress intended to preclude the *Bivens* remedy.

ination by a Congressman raised "special concerns counselling hesitation" due to the defendant's status as a Congressman; such concerns were nevertheless held not to preclude a *Bivens* remedy since they were accommodated by the coextensive protections of the Speech or Debate Clause. Similarly, to the extent that the governmental office of respondent here might otherwise raise a "special factor counselling hesitation," that factor is already accommodated by coextensive qualified immunity which attaches to actions in discharge of that office. Indeed, this Court has already expressly held that even where the defense of a *Bivens* action would inhibit the performance of official duties by defendant officers, this is not a "special factor" sufficient to preclude a *Bivens* remedy. *Carlson*, *supra*, 446 U.S. at 19.

B. The Reasons of the Court Below for Denying a *Bivens* Remedy Are Speculative and Without Merit

The decision of the court below is not only contrary to this Court's previous decisions, but the purported justifications for the lower court's decision are in any event unsound. The court below offered three reasons to support its conclusion that a *Bivens* remedy was inappropriate in this case. *Bush*, *supra*, 647 F.2d at 577. All these reasons are without merit.

First, it is an oversimplification to state that "inferring a *Bivens* remedy in this case would tend to interfere with and undermine the traditional control of the Government over its internal and personnel affairs." *Bush*, *supra* at 577. "The traditional control of the Government over its internal and personnel affairs" is not absolute; it is qualified by the First Amendment rights of federal employees. *See*, *e.g.*, *Butz* v. *Economou*, 438 U.S. 478, 495 (1978) ("[I]t cannot be doubted that these [federal] officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution"). The extent of that constitutional protection in any given case will require a balancing between the First Amendment right of the public employee

and the legitimate needs of the governmental employer. *Pickering* v. *Board of Education, supra*, 391 U.S. at 568. It is difficult to understand how the granting of a remedy to enforce a constitutional right interferes with the government to any greater extent than does the existence of the constitutional right itself. Moreover, absent proof by the governmental employer, this Court has repeatedly rejected as conclusory a bald claim that the exercise of a First Amendment right has interfered with the operation of a governmental agency. *E.g., Pickering* v. *Board of Education, supra*, 391 U.S. at 572-73. Furthermore, to the extent that defense of an action for damages might inhibit official duties, the defense of qualified immunity will "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow* v. *Fitzgerald*, 102 S. Ct. 2727, 2739 (1982); *Carlson, supra*, 446 U.S. at 19.[4]

Second, fear that a *Bivens* remedy would encourage the bypassing of civil service remedies is mere speculation unsupported by any evidence. The record is clear that petitioner did pursue his civil service remedies.[5] As the

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[4] Moreover, the scope of the *Bivens* remedy is limited by the scope of the First Amendment protection. For example, the First Amendment does not extend to the dismissal of policymaking confidential employees who are discharged by reason of their political affiliation. Elrod v. Burns, 427 U.S. 349 (1976). Furthermore, this Court has recognized that different considerations are involved under the First Amendment in "positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship." Pickering v. Board of Education, *supra*, 391 U.S. at 570 n.3. Thus, in those instances where the First Amendment balance tilts in favor of the government, the appropriate legal response is summary judgment on the merits, not denial of a *Bivens* cause of action.

[5] Similarly, in Nixon v. Fitzgerald, 102 S. Ct. 2690, 2695 (1982), another federal employee who was the victim of unlawful personnel actions pursued civil service remedies as well as *Bivens* and other remedies. There is nothing unusual or inap-

Eighth Circuit correctly noted in *Bishop* v. *Tice*, *supra*, 622 F.2d at 357, "[a] widespread evasion of civil service discharge appeal procedures in order to seek direct judicial relief is admittedly unlikely." It is unlikely for three reasons. First, the burden of proof is on the plaintiff in *Bivens* actions, whereas in the civil service proceedings, the governmental employer has the burden of proving the adverse action was for cause.[6] Second, the defense of qualified immunity is available to defendants under *Bivens*, but not in civil service proceedings.[7] Third, a *Bivens* action for damages from an official in his individual capacity would not permit agency reinstatement as appropriate relief,[8] because the agency is not a defendant.[9]

The third rationale of the court below—that a *Bivens* remedy would be a disincentive for congressional action to improve civil service remedies—is sheer speculation

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propriate about the simultaneous availability of independent administrative and judicial alternative remedies to an aggrieved party. Fitzgerald v. Seamans, 553 F.2d 220, 226 (D.C. Cir. 1979) (noting that employee has choice of either or both *Bivens* and civil service remedies). *See* Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (Title VII and 42 USC § 1983). *See also* Carlson v. Green, *supra* (*Bivens* and Federal Tort Claims Act).

[6] Bishop v. Tice, *supra*, 622 F.2d at 357 n.15.

[7] *See generally*, Butz v. Economou, *supra*, 438 U.S. 478.

[8] *See* Bishop v. Tice, *supra*, 622 F.2d at 357 n.15.

[9] For many of the same reasons that petitioner urges that a *Bivens* remedy be made available to him, the courts have not required exhaustion of administrative remedies for constitutional claims. *See, e.g.*, Patsy v. Board of Regents of State of Fla., 102 S. Ct. 2557 (1982). But should the future see evidence, here clearly lacking, that administrative remedies are being bypassed in favor of *Bivens* actions, surely judicial imposition of an exhaustion requirement would be better tailored to the problem than denial of the *Bivens* remedy altogether. Of course any such requirement would be satisfied on the facts of this case.

that is belied by the history of congressional concern for federal employees. From as far back as the Pendleton Act of 1883 to the Civil Service Reform Act of 1978, this congressional concern has been unwavering. Although by 1978, three circuits had found an implied cause of action under the First Amendment,[10] the creation of a *Bivens* remedy did not lessen congressional interest. To the contrary, on October 13, 1978, Congress enacted the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as 5 U.S.C. 1101 *et seq.*) which was "the most comprehensive reform of the Federal work force since passage of the Pendleton Act in 1883."[11] Thus, fears of congressional inaction have proven groundless. Moreover, there is no reason to suspect that congressional attention would wane should this Court endorse the *Bivens* remedy recognized by the Third, Sixth, Seventh and D.C. Circuits.

Moreover, there are additional reasons—not considered by the court below—which weigh against any finding that the federal employee's relationship with the federal government is a special factor precluding a *Bivens* remedy. First, it would be anomalous to deny federal employees the constitutional equivalent of the cause of action which is extended to state and local employees under the First and Fourteenth Amendments and 42 U.S.C. § 1983. It is well established that state and local employees can sue their governmental employer for violation of the First and Fourteenth Amendment,[12] can recover damages for such a constitutional violation,[13] and need not

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[10] *See* note 2, *supra*.

[11] S. Rep. No. 969, 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723.

[12] Pickering v. Board of Education, *supra*.

[13] *E.g.*, Simpson v. Weeks, 570 F.2d 240, 241 (8th Cir. 1978), *cert. denied*, 443 U.S. 911 (1979); Rosado v. Santiago, 562 F.2d 114 (1st Cir. 1977).

exhaust state administrative remedies, including analogous state civil service procedures.[14] There is no persuasive justification why *federal* employees should be accorded less judicial protection than their state and local counterparts. Indeed, " 'the constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression." *Carlson*, *supra*, 446 U.S. at 22; *Butz* v. *Economou*, *supra*, 438 U.S. at 504. Second, it would be anomalous to subject members of Congress to potential liability under *Bivens*, arising out of an employment relationship, *see Davis* v. *Passman*, *supra*, while exempting all federal supervisory employees in the Executive branch from similar liability.

II. The Mere Availability of Civil Service Administrative Remedies to a Federal Employee Does Not Preclude an Implied Cause of Action Under the First Amendment

This Court held in *Carlson* v. *Green*, *supra*, that one situation in which a *Bivens* remedy would not be allowed is "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and equally as effective." *Id.* at 18-19. The court below purported not to reach the question under *Carlson* of whether Congress intended the civil service remedies to be an equally effective substitute for a *Bivens* remedy, *Bush* v. *Lucas*, *supra*, 647 F.2d at 577, yet conceded that "we stress the remedies made available by Congress to an aggrieved civil servant in order to emphasize the care Congress has taken . . . ." *Bush* v. *Lucas*, *supra*, 647 F.2d at 576. Thus, it concluded that a *Bivens* remedy was barred regardless of whether Congress intended the

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[14] Patsy v. Board of Regents of State of Fla., 102 S. Ct. 2557 (1982) (no exhaustion of state administrative remedies required in employment discrimination suit under 42 USC § 1983); Monroe v. Pape, 365 U.S. 167, 183 (1961). *See, e.g.*, Simpson v. Weeks, *supra*, 570 F.2d at 241.

civil service remedies to be an equally effective substitute for a *Bivens* remedy.

The administrative remedies available to a federal employee in 1975 were limited.[15] A federal employee was entitled to notification and an opportunity to be heard before an agency representative in the event of a reduction in grade, as in this case. 5 C.F.R. § 752.202. If the final decision of the agency representative was adverse to the employee, he had the right to appeal to the Federal Employees' Appeals Authority in the Civil Service Commission.[16] 5 C.F.R. §§ 752.203(a), 772.304(c). If the decision of the Appeals Officer was adverse to the employee, the employee could request review from the Civil Service Commission Appeals Review Board. 5 C.F.R. § 772.310(a). If ultimately successful in the administrative process, a federal employee was entitled to reinstatement and back pay. 5 U.S.C. § 5596 and 5 C.F.R. § 752.402 (1974).

The availability of these civil service remedies does not bar an action for damages under *Bivens*. The government has not shown—and cannot show—that Congress expressly declared that the civil service remedies were intended as an equally effective substitute for a *Bivens* remedy. Nothing in the legislative history of various civil service acts shows that Congress meant to preempt a *Bivens* remedy or to create an equally effective substitute remedy for constitutional violations.

Many of the civil service acts were enacted prior to the Court's decision in *Bivens*.[17] Even when Congress

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[15] By letter dated November 25, 1975, petitioner Bush was reduced in grade and transferred. Joint App. at 15.

[16] As part of the Civil Service Reform Act of 1978, the Civil Service Commission was replaced by two agencies, the Office of Personnel Management and the Merit Systems Protection Board.

[17] *E.g.*, the Pendleton Act of 1883, the Lloyd-La Follette Act of 1912, the Back Pay Act of 1948, the Back Pay Act of 1966.

enacted the Civil Service Reform Act of 1978, some seven years after the *Bivens* decision, Congress did not state that a *Bivens* remedy was preempted.[18] On the contrary, the Congressional concern in 1978 was to provide additional, not diminished, protection for federal employees who spoke out on waste in government. *See* S. Rep. No. 969, 95th Cong., 2d Sess. 2 (1978) *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2724 ("the bill . . . [p]rovides *new* protections for employees who disclose illegal or improper Government conduct . . .") (emphasis supplied). Senator Abraham Ribicoff, Chairman of the Senate Committee on Governmental Affairs, stated that one of the purposes of the 1978 Act was to provide "*greater* protection for employees who lawfully disclose violations of laws and regulations in these agencies." *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978, Hearings Before the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 1 (1978) (emphasis supplied). Alan K. Campbell, Chairman of the Civil Service Commission, testified that the Act's creation of a Special Counsel to deal with whistleblowers who are the victims of agency reprisals "will be an *additional protection* in the system." *Id.* at 33. Thus, the D.C. Circuit correctly concluded in *Borrell* v. *United States Int'l Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982), that "Congress intended the CSRA to provide *additional*, not decreased, protection for federal employees who blow the whistle on illegal or improper government conduct." *Id.* at 990.

In any event, the provisions of the Civil Service Reform Act of 1978 do not apply to petitioner Bush because his claim accrued in 1975, prior to the January 1979

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[18] The entire legislative history of the Civil Service Reform Act of 1978 has been published in two volumes. Staff of House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Civil Service Reform Act of 1978* (Comm. Print 1979).

effective date of the Civil Service Reform Act of 1978.[19] Thus, regardless of the effectiveness of the 1978 reforms—and there is much to suggest that even these 1978 reforms were inadequate [20]—it is the effectiveness of the pre-1978 civil service remedies which were applicable to petitioner Bush that are relevant here.

Their ineffectiveness is demonstrated by the need to add the additional protections of the 1978 Act. Moreover, Congress was also explicit in 1978 about the ineffectiveness of civil service remedies. The Senate Committee on Governmental Affairs concluded "[t]he Civil Service Commission has been ineffective in protecting the rights of whistleblowers." [21] This conclusion was amply

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[19] Section 907 of the Civil Service Reform Act of 1978, Pub. L. 95-454, provided that the effective date was ninety days after enactment on October 13, 1978.

[20] A recent survey of federal employees by the Merit Systems Protection Board revealed that "[T]here is great uncertainty about the adequacy of whistleblower protection but most of those who venture an opinion believe they are inadequate" and that "[e]mployees express general skepticism about the very possibility of their being effectively protected against reprisals." Merit Systems Protection Board, *Do Federal Employees Face Reprisal For Reporting Fraud, Waste, or Mismanagement* 4-5 (1981). Such skepticism is justified. In three and a half years of operation, the Office of Special Counsel "has yet to win a case before the board establishing that a whistleblower's rights have been violated." 62 Amer. Bar Ass. J. 1065 (Sept. 1982). The Office has been so ineffective that a principal proponent of civil service reform has introduced legislation to abolish the Office of Special Counsel of the Board. *See* H.R. 6392, 97th Cong., 2d Sess., 128 Cong. Rec. 2271 (daily ed. May 17, 1982) (Cong. Schroeder).

[21] Staff of Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess., *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse and Corruption* (Comm. Print 1978). *See also* 124 Cong. Rec. S14280 (daily ed. Aug. 24, 1978) (remarks of Senator Sasser) ("patriotic employees who bring examples of official wrongdoing to the public's attention have, in the past, enjoyed no meaningful protection against reprisals. . . .").

supported by the evidence before Congress, including the candid admission by the Chairman of the Civil Service Commission that "there is insufficient protection for employees—so-called 'whistleblowers'—who are harassed for calling attention to violations of laws and regulations within their agencies." [22]

Thus, the 1978 legislative history is abundantly clear that Congress did *not* view the pre-1978 civil service remedies as equally effective as a *Bivens* remedy. Rather, the Congressional opinion was that the civil service remedies were ineffective. This is far short of the requirement that there be a demonstration of a specific congressional intent to provide an equally effective substitute for *Bivens*. Under the *Carlson* test, a *Bivens* remedy cannot appropriately be denied.

Moreover, here, as in *Carlson*, there are additional significant differences between the administrative remedies and the *Bivens* remedy which support the conclusion that the *Bivens* remedy is more effective than either pre-1978 or post-1978 civil service remedies.

First, as in *Carlson*, the *Bivens* remedy here would serve as a more effective deterrent than the civil service remedy because the *Bivens* remedy is recoverable from the individual constitutional offender. *Carlson*, *supra*, 446 U.S. at 21. To Congress, this deterrent potential is critical, especially in light of the general skepticism among federal employees about the efficacy of civil service remedies.[23] The Civil Service remedy of reinstate-

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[22] *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978, Hearings Before the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 91 (1978) (statement of Alan K. Campbell).

[23] See federal employee survey, note 20, *supra*. The Civil Service Reform Act of 1978 did authorize the Special Counsel to seek disciplinary action in appropriate cases against violators of whistleblower rights. 5 USC §§ 1206(g)(1) and 1207. To our knowl-

ment with back pay, which petitioner received here, is not directed at the offending official and has little deterrent effect. However, the prospect of individual liability for unconstitutional action has an almost axiomatic deterrent effect. *Carlson, supra*, 456 U.S. at 21.

Second, as in *Carlson*, the *Bivens* remedy may involve punitive damages, which this Court recognized are "especially appropriate to redress the violation by a Government official of a citizen's constitutional rights." *Id.* at 22. Punitive damages are not available in administrative proceedings, and petitioner has been limited to reinstatement with back pay even though respondent's acts have taken years from petitioner's career.

Third, the civil service remedies do not provide for a trial by jury as does *Bivens*. *Carlson, supra* at 22.

Thus, petitioner's *Bivens* action cannot properly be denied under *Carlson* since (1) there is no specific legislative mandate that the remedy is precluded by an equally effective substitute remedy; (2) to the contrary, the legislative history indicates that Congress believed the civil service remedies to be ineffective at the time of the adverse actions affecting petitioner Bush and (3) the *Bivens* action is superior to civil service remedies in deterrent effect, availability of punitive damages, and a jury trial.

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edge, no such disciplinary actions have been taken in any case involving whistleblowers. *See Civil Service Reform Oversight, 1980-Whistleblowers: Hearings Before the Subcomm. on the Civil Service of the House Comm. on Post Office and Civil Service*, 96th Cong., 2d Sess. 17 (1980) (statement of Mary Eastwood, Acting Special Counsel) ("The Special Counsel has not yet filed a complaint for disciplinary action . . ."); Office of the Special Counsel, *Report to the Chairwoman, Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service for the Period April 1, 1981 to March 31, 1982* at 4-5 (five complaints filed, four involving violations of the Hatch Act and one involving a violation of the nepotism rule). Thus, since the statutory authority has not been used in whistleblowing cases, it has little, if any, deterrent effect.

III. Denial of a *Bivens* Remedy for Federal Employees Will Interfere with Effective Exercise of the Congressional Functions of Oversight and Investigation of the Executive Branch

This Court has long recognized that "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *McGrain* v. *Daugherty*, 273 U.S. 135, 175 (1927); *accord*, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 504 (1975). Thus, "the power of the Congress to conduct investigations is inherent in the legislative process." *Watkins* v. *United States*, 354 U.S. 178, 187 (1957). The scope of this power of inquiry "is as penetrating and far reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt* v. *United States*, 360 U.S. 109, 111 (1959).

This Court has also recognized that in the frequent cases where the Congress does not have the necessary information for effective legislation, it must often rely on employees of the Executive branch who have the requisite information. *See McGrain* v. *Daugherty*, *supra*, 273 U.S. at 175. In particular, "[f]ederal employees are often the source of information about agency operation suppressed by their superiors." [24] If these federal employees do not inform Congress and the public of these agency operations, it is unlikely that these situations will ever be made public.[25] Thus, it is beyond question that "whistle-

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[24] Staff of Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess., *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse and Corruption* 40 (Comm. Print 1978).

[25] *See Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978, Hearings Before the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess., 860 (1978) (statement of Senator Patrick J. Leahy).

blowers provide valuable assistance to Congress in its fulfillment of its oversight responsibilities." [26]

The comments of petitioner Bush to the media which precipitated the adverse actions against him by his superiors involved an issue of public importance—namely, the possible waste of government funds in a make-work position. This is the type of information which Congress needs to carry out its oversight functions and assure productivity of the federal work force, but can only obtain from individual employees like petitioner. Denial of a *Bivens* remedy will chill the flow of this necessary information to Congress.

Furthermore, the issue of an implied cause of action under the First Amendment has significance in many factual contexts other than this case. For example, denial of a *Bivens* remedy may permit high officials of the Executive branch to fire, with impunity, a federal employee who testified truthfully before Congress,[27] particularly since the civil service remedies do not authorize disciplinary action against presidential appointees. 5 U.S.C. § 1206(g)(2). Reinstatement of the wrongfully fired employee provides no deterrent in such a situation because the individual offender cannot be penalized even if the Special Counsel has the will.

In summary, denial of a *Bivens* remedy in this case is not only contrary to this Court's decisions, unsupported by any persuasive justification, and at odds with congressional intent, but it has the potential to interfere drastically with the oversight and investigative functions of Congress.

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[26] *Id.* at 857 (statement of Senator Abraham Ribicoff).

[27] *Cf.* Harlow v. Fitzgerald, *supra*, 102 S. Ct. 2727.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the Court should reverse the decision below, and, in so doing, declare that a federal employee does have an implied cause of action for damages under the First Amendment when that employee is the victim of a constitutional violation.

Respectfully submitted,

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